

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES HENRY MCHENRY III,

Defendant-Appellant.

UNPUBLISHED

October 21, 2008

No. 279071

Oakland Circuit Court

LC Nos. 2006-211552-FC

2006-213256-FC

2006-213257-FC

2006-213258-FC

Before: Servitto, P.J. and Donofrio and Fort Hood, JJ.

PER CURIAM.

A jury convicted defendant of four counts of armed robbery, MCL 750.529, and two counts of possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced defendant to concurrent prison terms of 428 to 720 months for the armed robbery convictions, to be served consecutive to two two-year terms of imprisonment for the felony-firearm convictions.¹ Defendant appeals as of right guideline departures on the minimum portion of his sentences. Because the guideline departure is supported by substantial and compelling reasons, the factors considered by the trial court are objective and verifiable, the found factors support the extent of departure, and the minimum sentence imposed falls within the range of principled outcomes as a proportionate sentence, we affirm, but remand for ministerial correction of the judgment of sentence in LC No. 2006-213257-FC. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

¹ The judgments of sentence for LC Nos. 2006-211552-FC, 2006-213256-FC, and 2006-213258-FC all list defendant's armed robbery sentence as 428 to 720 months. In LC No. 06-213257-FC, however, the armed robbery sentence is given as 428 to 770 months. The trial court stated at sentencing that it intended to impose the same sentence for each armed robbery conviction, which it announced as 428 months to 720 months (i.e., the sentence listed in the judgments of sentence for the other three cases). Thus, it is apparent that the sentence of 428 to 770 months listed in the judgment of sentence for LC No. 06-213257-FC is a clerical error. Accordingly, we remand for correction of the judgment of sentence in LC No. 06-213257-FC to specify a sentence of 428 to 720 months for the armed robbery conviction, consistent with the trial court's statement on the record at sentencing.

Defendant and four other young men engaged in a series of robberies over a four-day period. Defendant provided a gun, which was either used or at least referenced in each robbery. The sentencing guidelines range for defendant's armed robbery convictions was 171 to 285 months. MCL 777.62. The trial court elected to depart from this range based on a number of factors, which included defendant's age, his prior record, the minimal time span over which the prior offenses were committed, defendant's probationary status, the brutal nature of the offenses which put the victims' lives at risk, the escalating level of violence in defendant's crimes, and the fact that defendant was only charged and convicted of two counts of felony-firearm.

A court must impose a minimum sentence within the appropriate guidelines range unless a departure from that range is permitted. MCL 769.34(2). The court may depart from the guidelines range if it "has a substantial and compelling reason for that departure and states on the record the reasons for departure." MCL 769.34(3). A court may not base a departure on discriminatory reasons or on factors already considered by the guidelines unless those factors have been given inadequate or disproportionate weight. MCL 769.34(3)(a) and (b); *People v Armstrong*, 247 Mich App 423, 425; 636 NW2d 785 (2001). A departure is appropriate "if there are substantial and compelling reasons that lead the trial court to believe that a sentence within the guidelines ranges is not proportionate to the seriousness of the defendant's conduct and to the seriousness of his criminal history," such that a departure would result in "a more proportionate criminal sentence than is available within the guidelines range." *People v Babcock*, 469 Mich 247, 264; 666 NW2d 231 (2003).

"[T]he Legislature intended 'substantial and compelling reasons' to exist only in exceptional cases." *People v Fields*, 448 Mich 58, 68; 528 NW2d 176 (1995). Only objective factors that are capable of verification may be used to assess whether there are substantial and compelling reasons to deviate from the minimum sentence range under the guidelines. *Babcock*, *supra* at 257. Objective and verifiable factors are "actions or occurrences that are external to the minds of the judge, defendant, and others involved in making the decision, and must be capable of being confirmed." *People v Abramski*, 257 Mich App 71, 74; 665 NW2d 501 (2003). Further, it is not sufficient that the court simply identify an objective and verifiable factor; it must explain why that factor justifies a departure from the guidelines. *People v Johnson (On Remand)*, 223 Mich App 170, 173-174; 566 NW2d 28 (1997). The court must also explain why the factor cited supports the extent of the departure. *People v Smith*, ___ Mich ___; 754 NW2d 284 (2008); *Babcock*, *supra* at 272.

"On appeal, courts review the reasons given for a departure for clear error. The conclusion that a reason is objective and verifiable is reviewed as a matter of law. Whether the reasons given are substantial and compelling enough to justify the departure is reviewed for an abuse of discretion, as is the amount of the departure. A trial court abuses its discretion if the minimum sentence imposed falls outside the range of principled outcomes." *Smith*, *supra*, 754 NW2d at 290 (footnotes omitted).

Defendant's age is an objective and verifiable factor not considered by the guidelines, although it alone is not so substantial and compelling to warrant a departure from the guidelines. *People v Young*, 276 Mich App 446, 457; 740 NW2d 347 (2007). However, the court may give limited consideration to "a defendant's age in terms of other permissible and relevant individual factors such as the absence or presence of a prior record." *People v Fleming*, 428 Mich 408, 423-424 n 17; 410 NW2d 266 (1987). Although the nature and severity of defendant's prior

convictions or adjudications are taken into account by the guidelines, the fact that the level of violence has escalated over time is an objective and verifiable fact not taken into consideration by the guidelines and provides a valid basis for departure. In addition, while defendant's status as a probationer is considered by the guidelines, the guidelines do not take into consideration that defendant was both on probation and on youthful trainee status. Nor do the guidelines account for the fact that defendant violated his probation by committing these offenses, which provides a valid basis for departure. *People v Schaafsma*, 267 Mich App 184, 185-186; 704 NW2d 115 (2005).

The characterization of a defendant as "incurable" is a reflection of his recidivist nature and cannot justify a departure from the guidelines unless the court finds that the prior record variables do not give it adequate weight. Here, the court related its characterization of defendant's incurability to the inadequate weight provided by his score on the prior record variables as indicated by the previously mentioned reasons for departure, i.e., that at a relatively young age, defendant had acquired a rather extensive criminal record, that some of the offenses occurred within a very short time of arrests for previous offenses, that the offenses escalated in violence, that defendant failed to benefit from the courts' lenity, and that defendant violated his probationary status.

The trial court did not clearly err to the extent that it based its departure on the brutal nature of the offenses that terrorized the victims and placed their lives at risk due to the presence of a gun. These factors were all considered by the guidelines and accounted for 40 percent of the OV score. However, all four episodes involved the use of a gun but defendant was not charged with felony-firearm in two of the cases. In addition, defendant's total OV score was 75 points higher than the 100 points necessary to place a defendant in the highest level of offense severity. An "off-the-chart" score is an indication that the offense variables have indeed been given inadequate weight and provides a valid basis for departure. *People v Sarah Stewart*, 442 Mich 937; 505 NW2d 576 (1993).

For these reasons, the trial court did not abuse its discretion in finding substantial and compelling reasons to depart from the guidelines.

In determining whether the departure is proportionate, the court may compare the departure sentence to the recommended minimum sentences for the applicable sentencing class. *Smith, supra*, 754 NW2d at 295. For a Class A felony, a minimum sentence of 428 months is permitted only for those defendants who have the maximum PRV score (75 points) and maximum OV score (100 points). MCL 777.62. In this particular case, defendant had a mid-range PRV score (39 points), but an OV score (175 points) well in excess of the 100-point maximum. In that situation, "the court may render a proportionate sentence above the highest minimum for someone with a similar PRV score . . . because the Legislature did not contemplate a defendant with such a high OV score, given that it used 100 OV points as the maximum for the grid." *Smith, supra*, 754 NW2d at 296. Given the trial court's numerous valid reasons for departure and the fact that defendant's total OV score was well in excess of the maximum for his sentencing grid, the extent of the departure was not so disproportionate as to constitute an abuse of discretion.

We affirm defendant's sentences, but remand for ministerial correction of a clerical error in the judgment of sentence in LC No. 2006-213257-FC to specify a sentence of 428 to 720

months for the armed robbery conviction, consistent with the trial court's statement on the record at sentencing.

Affirmed and remanded. We do not retain jurisdiction.

/s/ Deborah A. Servitto

/s/ Pat M. Donofrio

/s/ Karen M. Fort Hood